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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HARES AJMAL AHMADZAI,

Defendant and Appellant.

G046631

(Super. Ct. No. 93HF0739)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Richard F. Toohey, Judge. Dismissed.

Roger S. Hanson for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Hares Ajmal Ahmadzai appeals the denial of his second motion to vacate judgment pursuant to Penal Code¹ section 1016.5. We dismiss the appeal because as defendant pled guilty and his motion to vacate the judgment challenges the validity of his guilty plea, defendant was required to obtain a certificate of probable cause in order to appeal the denial of his motion. (*People v. Placencia* (2011) 194 Cal.App.4th 489, 491-492.)

I

FACTS

Defendant pled guilty to selling marijuana (Health & Saf. Code, § 11360, subd. (a)) on November 23, 1994. As a result of his guilty plea, the court placed him on three years of probation and imposed no jail time. On August 18, 1999, the court granted defendant's section 1203.4 motion to withdraw his guilty plea and dismissed the action upon his successful completion of probation. On October 28, 2010, defendant filed his first motion to set aside his conviction pursuant to section 1016.5. The superior court denied that motion on December 10, 2010. More than a year later, on January 18, 2012, defendant brought a second motion to set aside the judgment pursuant to section 1016.5. The superior court denied the motion again, this time in a written decision. Defendant filed a notice of appeal a month later, but he apparently did not seek or obtain a certificate of probable cause.

II

DISCUSSION

Section 1016.5 requires a judge, prior to acceptance of a guilty plea or plea of nolo contendere on a misdemeanor or a felony, to advise the defendant as follows: "If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission

¹ All statutory references are to the Penal Code unless otherwise stated.

to the United States, or denial of naturalization pursuant to the laws of the United States.” (§ 1016.5, subd. (a)(1).) The minute order from the date of defendant’s guilty plea states the court advised defendant of the possible immigration consequences. Defendant also signed a change of plea form and initialed the form next to the same advisement. He was advised as required by section 1016.5.

Defendant argues that because the sale of marijuana *requires* deportation as a matter of federal law, the advisement he was provided was insufficient and violated the command of *Padilla v. Kentucky* (2010) 559 U.S. ___ [130 S.Ct. 1473]. The issue in *Padilla*, however, was whether *defense counsel* “had an obligation to advise [the defendant] that the offense to which he was pleading guilty would result in his removal from this country.” (*Id.* at p. ___ [130 S.Ct. at p. 1478].) Moreover, in *Chaidez v. U.S.* (2013) ___ U.S. ___ [133 S.Ct. 1103], the United States Supreme Court found *Padilla* is not to be given retroactive effect. (See *Teague v. Lane* (1989) 489 U.S. 288.) In other words, a person whose conviction became final prior to the issuance of the decision in *Padilla* does not receive the benefit of the *Padilla* decision. Defendant’s conviction in this matter was final more than 15 years before *Padilla* was decided.

In his 2012 motion, defendant argued the judgment should be set aside because counsel was ineffective in failing to advise him of the immigration consequences of his guilty plea. However, competence of counsel is not a ground upon which a plea may be withdrawn pursuant to section 1016.5. That section places no requirement on counsel; it requires the court to advise the defendant. If the basis for setting aside a judgment is counsel’s failure to properly advise the defendant, the proper vehicle is a petition for a writ of habeas corpus. (*People v. Shokur* (2012) 205 Cal.App.4th 1398, 1404.)

Defendant contends our Supreme Court’s decision in *People v. Totari* (2002) 28 Cal.4th 876 authorizes his appeal in this matter. His reliance on *Totari* is misplaced. While *Totari* held the denial of a motion to vacate a conviction pursuant to

section 1016.5 is an appealable order (*id.* at p. 887), the defendant in that case, unlike defendant here, obtained a certificate of probable cause. (*Id.* at p. 880.) Defendant's failure to obtain a certificate of probable cause precludes this appeal.

Section 1237.5 requires a defendant to obtain a certificate of probable cause from the trial court as a condition of appealing a judgment of conviction obtained by way of a guilty plea or plea of nolo contendere. "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court." (§ 1237.5.)

There are exceptions to the certificate of probable cause requirement, but they do not apply here. For example, after having pled guilty, a defendant may appeal based on the denial of a motion to suppress pursuant to section 1538.5 (Cal. Rules of Court, rule 8.304(b)(4)(A)), or if the defendant raises grounds for appeal that "arose after entry of the plea *and do not affect the plea's validity*." (Cal. Rules of Court, rule 8.304(b)(4)(B), italics added.)

"In determining the applicability of section 1237.5, the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made. . . . If a defendant challenges the validity of his plea by way of a motion to withdraw the plea, he cannot avoid the requirements of section 1237.5 by labeling the denial of the motion as an error in a proceeding subsequent to the plea. [Fn omitted.]' (*People v. Ribero* (1971) 4 Cal.3d 55, 63-64.)" (*People v. Arwood* (1985) 165 Cal.App.3d 167, 172.)

Although defendant did not appeal his conviction in 1994, his motion in 2012 to withdraw his guilty plea pursuant to section 1016.5 challenged the validity of his guilty plea. A motion to vacate the judgment under section 1016.5, even if made years after the conviction, “constitutes an attack on the validity of the plea, and an appeal from the denial of the motion requires the defendant to obtain a certificate of probable cause from the trial court in compliance with section 1237.5.” (*People v. Placencia, supra*, 194 Cal.App.4th at pp. 491-492.) Because defendant did not obtain a certificate of probable cause, we dismiss the appeal.

III

DISPOSITION

The appeal is dismissed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.